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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 12123-s76M BY THOMAS BLADHOLM AND IN THE MATTER OF THE APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. 9782-c76M BY THOMAS AND LYDIA BLADHOLM	)))))))	FINAL ORDER

* * * * * * * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. No timely exceptions were received from any party of record. The Department hereby accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the June 22, 1984 Proposal for Decision, and incorporates them herein by reference. The Proposed Order has been rewritten for clarification, but no terms, conditions, or restrictions have been changed therein, nor have the rights granted therein been reduced or enlarged.

Therefore, based upon the Findings of Fact and Conclusions of Law, and all files and records in this matter, the Department makes the following:

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FINAL ORDER

Subject to the terms, conditions, and restrictions described below, Application for Beneficial Water Use Permit No. 12123-s76M is hereby granted to Thomas and Lydia Bladholm to appropriate 5.63 cfs up to a total of 419.3 acre-feet per year of surface water from the West Fork of Six Mile Creek, otherwise known as Isaac Creek. Of the total volume granted above, up to 167.1 acre-feet per year may be appropriated for storage for irrigation purposes, to be stored in four reservoirs, with a combined capacity of 167.1 acre-feet, located in Sections 15 and 22, Township 15 North, Range 22 West. The remaining 252.2 acre-feet per year may be appropriated for immediate use for irrigation on a total of 101 acres of land consisting of 31.8 acres in the NW¼ of Section 15, 15.4 acres in the SW¼ of Section 15, 27 acres in the SE¼ of Section 15, 8 acres in the NE¼ of Section 22, and 18.8 acres in the NW¼ of Section 22, all in Township 15 North, Range 22 West, Missoula County, Montana.

The waters are to be diverted from the West Fork of Six Mile Creek by means of an existing ditch at a point in the NW¼NW¼NE¼ of Section 2, Township 15 North, Range 22 West, and conveyed to the places of use and storage through the Scheffer Ditch. The priority date for the water right granted herein shall be October 8, 1976 at 12:58 p.m.

A. In no event (except as specified in "B" below) shall the waters provided for herein be withdrawn from Isaac Creek or withdrawn from any irrigation storage reservoir for irrigation use prior to April 1 of any given year, nor subsequent to October 31, inclusive, of any given year..

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B. In no event shall the Permittees divert waters of Isaac Creek into the irrigation storage reservoirs except between the times of September 15 through June 15.

C. The Permittees herein are entitled to a single fill of their storage facilities annually and upon such filling, no more water shall be diverted pursuant to the storage rights granted herein whether or not water has been carried over from a prior year.

D. The Permittees shall not divert waters pursuant to the direct flow rights reflected herein except at times of need therefore, and at all other times the Permittees shall cause and otherwise allow such waters to remain in the source of supply.

E. The Permit in this matter is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittees to the detriment of any senior appropriator.

F. The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by this Permit, even if such damage is a necessary and unavoidable consequence of the same.

The Application for Change of Appropriation Water Right No. 9782-c76M is hereby denied, but jurisdiction is explicitly reserved over the question of what conditions can be imposed on the proposed change to effectuate some measure of it. Upon petition of either party hereto, further hearings will be had on this limited question.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 24 day of September, 1985.

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on September 30, 1985, she deposited, postage prepaid, in the United States First Class mail, a FINAL ORDER by the Department on the Application by THOMAS BLADHOLM, Application No. 12123-s76M Application for Beneficial Water Use Permit and Change of Appropriation Water Right No. 9782-c76M, addressed to each of the following persons or agencies:

1. Thomas & Lydia Bladholm, Six Mile road, Huson, Montana 59846
2. Chris Swartley, Suite A, Century Plaza Building, Missoula, Montana 59801
3. Allen & Eva Heare, Six Mile Road, Huson, Montana 59846
4. Juanita Hirschi, Dennis Sheffer, Joseph Sheffer, Huson, Montana 59846
5. Harold V. Dye, Milodragovich, Dale & Dye, Drawer R, Missoula, Montana 59806
6. Jack & Delores Shuck, Six Mile Road, Huson, Montana 59846
7. David & Darlene West, Lorrie Burger, Six Mile Road, Huson, Montana 59846
8. Trudy & Robert Shotliff, 2526 Gilvert, Missoula, Montana 59801
9. Mike McLane, Field Manager, Missoula Water Rights Field Office (inter-departmental mail)
10. Gary Fritz, Administrator, Water Resources Division (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 30th day of September, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Notary Public for the State of Montana
Residing at HELENA, Montana
My Commission expires 1-21-1987

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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	
NO. 12123-s76M BY THOMAS BLADHOLM)	PROPOSAL FOR DECISION
AND IN THE MATTER OF THE APPLICATION)	
FOR AUTHORIZATION TO CHANGE EXISTING)	
RIGHT NO. 9782-C76M BY THOMAS AND)	
LYDIA BLADHOLM)	

* * * * * * * * * * * *

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Missoula, Montana. The hearings were consolidated because of the similarity in parties.

STATEMENT OF THE CASE

The Applicant seeks to change 5.63 cfs up to 145.25 acre feet per year that has heretofore been used for irrigation of 58.1 acres more or less located in the S½ of Section 15 and the NE¼ of Section 22, Township 15 North, Range 22 West. The Applicant proposes to change the place of use of this asserted right to 58.1 acres more or less in the the NW¼ of Section 15, Township 15 North, Range 22 West.

The Applicant also seeks a new water use permit to appropriate 5.63 cubic feet per second up to 167.1 acre feet by way of storage, and 5.63 cubic feet per second up to 252 acre feet per year by direct flow diversion to irrigate approximately 101 acres, more or less, from April 1 through October 31 of each year.

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The pertinent portion of the Applicant's plans were duly published three (3) successive weeks in the Missoulian, a news paper of general circulation printed and published at Missoula, Montana.

Objections to these applications were filed with the Department of Natural Resources and Conservation by Juanita Hirschi and Dennis Scheffer, Allen and Eva Heare, Robert Shotliff, Trudy Shotliff, anbd Jack and Delores Shuck. Only the Scheffers and Juanita Hirschi actually appeared and testified in these proceedings.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto, whether they have appeared or not.
2. The Applicant seeks to change the place of use of an existing right from the S½ of Section 15 and the NE¼ of Section 22 to the NW¼ of Section 15, T15N, R22W. The old place of use comprised approximately 58.1 acres and the new place of use comprises approximately 58.1 acres.
3. The Objectors' point of diversion is not situated in a position where it could physically capture any return flows, through seepage or otherwise, that could accrue to the source of supply from the irrigation of the old place of use, or from any of the places historically irrigated by the Applicant or his predecessor in interest.

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4. The old place of use (the 58.1 acres) was irrigated, but not regularly and customarily on an annual basis. The Applicant now intends to customarily and regularly irrigate the new place of use.
5. The Applicant has failed to prove the diversion rate of its water rights.
6. The watershed of the source of supply has been logged in some measure in the recent past. The inevitable consequence of such a practice is to accelerate the snow-melt runoff, leaving less water in the source of supply in late summer months. The record is insufficient to quantify this effect, or to characterize it as negligible or significant.
7. The source of supply at controversy herein is Isaac Creek, also known as the West Fork of Six Mile Creek.
8. The Applicant diverts his supply at a point in the NW¼NW¼NE¼ of Section 2, T15N, R22W, into a structure known as the Scheffer Ditch. The Objectors divert water approximately a mile further down the source of supply.
9. In the recent past, the Applicant has replaced the flood gravity irrigation system used historically with a sprinkler irrigation system. A sprinkler irrigation is substantially more efficient than a flood system, meaning that a substantially greater proportion of a unit of water diverted is actually consumed by the crops.
10. The lands owned by the Applicant have historically been used and are currently being used as a cattle ranch, with irrigation for the cultivation of hay.

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11. The Applicant is a successor in interest to a 225 miner's inch filed right out of 300 miner's inch right claimed by a notice of appropriation with a priority date of 1904.

12. In the recent past, the Applicant has reworked his diversion structure in Isaac Creek, and made improvements on the ditch system. The diversion structure is a small rock and sandbag dam in Isaac Creek, and such a structure is comparable to that used historically to divert the right.

13. A culvert under a county road limits and has historically limited the ditch capacity. The culvert has a fifteen (15) inch capacity. The culvert probably does not have the capacity to pass 225 inches except under ideal conditions.

14. The Objectors use the waters of Isaac Creek for the cultivation of hay, and have historically used such waters for this purpose.

15. The Applicant intends to construct four reservoirs with a combined capacity of 167.1 acre feet. The Applicant intends to appropriate 167.1 acre feet annually for irrigation by way of these storage units. The point of diversion for the water to be diverted for these reservoirs is identical to the existing point of diversion.

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16. There are unappropriated waters in the source of supply available for the Applicant's new use throughout the winter and spring-snowmelt seasons. If the Applicant cannot secure his full appropriation during such seasons, he is unlikely to secure it at all in that year..

17. The diversion and use of the amounts claimed for new use will not for all practical purposes inevitably capture water otherwise required for downstream demand.

18. The diversion and use of the amounts claimed for new use will not adversely affect other appropriators.

19. The diversion facilities planned for the Applicant's new use are reasonable, customary and adequate for the Applicant's purposes, and said means will not result in the waste of the water resource.

20. The amounts claimed for a new use are a reasonable estimate of the quantity of water required for such purposes, and the use of said quantities of water will not result in the waste of water resource. The use of said amounts can and will be of material benefit to the Applicant. The crops intended cannot be produced without the use of said quantities of water or at least the yield of such crops would be markedly less without the use of such quantities.

21. The waters sought herein for new use will be diverted from the Schaeffer ditch into a pipeline, and thence applied to the place of use by means of a sprinkler system.

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22. The use of the quantities claimed herein for agricultural purposes is a beneficial one.

23. The application for new use was duly and regularly filed with the Department of Natural Resources and Conservation on August 10, 1976, at 12:58 p.m.

24. The Applicant's proposed change will result in an increase in historic use to the detriment of the Objectors vested rights to maintenance of the stream conditions, in view of the Applicant's other changes attendant to the replacement of the flood irrigation system with a sprinkler system. The record is insufficient to quantify this effect.

25. Historically, the Scheffer place irrigated a total of 174 acres being comprised of the following acreages:

Field # 1	-	19 acres
Field # 2	-	25 acres
Field # 5	-	34 acres
Field # 7	-	3 acres
Field # 8	-	33 acres
Field # 9	-	27 acres
Field #11	-	20 acres
"Dam Area"	-	12 acres

There is no evidence, however, that all of these areas were regularly and customarily irrigated on an annual basis, and indeed the evidence shows that not all this acreage was so regularly irrigated.

Out of these acreages specified in the foregoing finding, certain areas will be retired from agricultural production and certain other areas expanded. The total acreage planned to be irrigated is 75 acres, representating a net increase of approximately 101 acres.

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26. The consumption of the old place of use and the consumption of the new place of use will be for all practical purposes equal, and the total water demand for the old place of use and the total water demand for the new place of use will be for all practical purposes equal.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto, whether they have appeared or not. MCA 85-2-301, et seq., MCA 85-2-402.
2. The Applicant has the burden of proof by a preponderance on its application for a new water use permit.
3. The Applicant's proposed use attendant to the application for a new water use permit is a beneficial one, as it is agricultural within the meaning of MCA 85-2-102(2). Further, the amounts sought for new use are a reasonable estimate of the quantity of water required for such purposes. Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905), Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).
4. The Applicant's means of diversion are adequate, reasonable and customary for his intended purposes. State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).
5. The Applicant's use of water pursuant to its application for a new water use permit will not adversely affect the rights of prior appropriators.

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6. There is unappropriated water in the amounts the Applicant seeks throughout the period of diversion actually intended.

7. The Applicant has failed to prove the diversion rate of the existing right that is the subject matter of the change.

8. The Applicant's use pursuant to its changed right would result in an enlargement of his appropriation to the detriment of the Objector's vested rights to maintenance of the stream conditions as of the time of their appropriations.

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following proposed Orders are hereby issued.

Subject to the terms, conditions, and restrictions described below application for beneficial water Use Permit No. 12123-s67M is hereby granted to Thomas and Lydia Bladholm to appropriate 3.63 cfs up to 167.1 acre feet per year by way of storage, and to appropriate 3.63 cfs up to 252 acre feet per year by direct flow diversion to irrigate 31.8 acres in the NW¼ and 15.4 acres in the SW¼ and 27 acres in the SE¼ all in Section 15, Township 15 North, Range 22 West, and 8 acres in the NE¼, and 18.8 acres in the NW¼ all in Section 22, Township 15 North, Range 22 West. The source of supply for the waters provided for herein shall be the West Fork of Six Mile Creek, otherwise known as Isaac Creek, the waters are to be diverted at a point in the NW¼NE¼ of Section 2,

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Township 15 North, Range 22 West, all in Missoula County. The priority date for the rights granted herein should be October 8, 1976 at 12:58 p.m.

Provided that, in no event shall the waters provided for herein be withdrawn from Isaac Creek or withdrawn from any reservoir for use prior to April 1 of any given year nor subsequent to October 31, inclusive, of any given year;

Provided further that in no event shall the applicant divert waters of Isaac Creek into his storage reservoirs except between the times of September 15 through June 15;

Provided further that the Applicant herein is entitled to a single fill of his storage facilities annually and upon such filling, no more water shall be diverted pursuant to the storage rights granted herein whether or not water has been carried over from a prior year;

Provided further that the Applicant shall not divert waters pursuant to the direct flow rights reflected herein except at times of need therefore, and at all other times the Applicant shall cause and otherwise allow such waters to remain in the source of supply.

WHEREFORE, the application for change of existing right is hereby denied, but jurisdiction is explicitly reserved over the question of what conditions can be imposed on the proposed change to effectuate some measure of it. Upon petition of either party hereto, further hearings will be had on this limited question.

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NOTICE

Exceptions and objections to this Proposal for Decision must be filed with Gary Fritz, Administrator, Water Resources Division, 32 South Ewing, Helena, Montana, no later than 20 days after service of this Order. Said filings must include a demand for oral argument, or the same is waived.

DATED this 20th day of June, 1984.

Matthew W. Williams
Department of Natural Resources
and Conservation
32 South Ewing
Helena, Montana 59620
406/444-6698

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AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Dorothy Millsop, Legal Secretary of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on June 26, 1984, she deposited in the United States mail, a PROPOSAL FOR DECISION by the Department on the Application by THOMAS BLADHOLM, Application No. 12123-s76M, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Thomas & Lydia Bladholm, Six Mile Road, Huson, Montana 59846
2. Chris Swartley, Suite A, Century Plaza Building, Missoula Montana 59801
3. Allen & Eva Heare, Six Mile Road, Huson, Montana 59846
4. Juanita Hirschi, Dennis Sheffer, Joseph Sheffer, Huson, Montana 59846
5. Harold V. Dye, Milodragovich, Dale & Dye, Drawer R, Missoula, Montana 59806
6. Jack & Delores Shuck, Six Mile Road, Huson, Montana 59846
7. David and Darlene West, Lorrie Burger, Six Mile Road, Huson, Montana 59846
8. Trudy and Robert Shotliff, 2526 Gilbert, Missoula, Montana 59801
9. Dave Pengelly, Missoula Area Water Rights Office (regular department mail)
10. Matt Williams, Hearing Examiner, DNRC, Helena, hand deliver

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by _____

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 26th day of June, 1984, before me, a Notary Public in and for said state, personally appeared Dorothy Millsop, known to me to be the Legal Secretary of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

_____
Notary Public for the State of Montana
Residing at _____, Montana
My Commission expires _____

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MEMORANDUM

New Water Use Permit

Beneficial Use and Means of Diversion

There is not much dispute over the character of the Applicant's proposed use as being beneficial, nor over the quantity of water necessary for the use. Agriculture is within the class of uses that are regarded as beneficial, MCA 85-2-102(2), and the amounts claimed herein are a reasonable estimate of the quantity required for such purposes, in view of the necessary losses in the system. See generally, Morden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939). The flow rate is set at the maximum the ditch will carry. This is reasonable in view of the storage character of the appropriation, and the capacity of the sprinkler system.

The diversion system is reasonable and customary for its intended purposes, and its use will not result in the waste of the water resource. See State ex rel Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939).

Unappropriated Water and Adverse Affect

These statutory thresholds yield no significant questions, at least insofar as the Applicant seeks an appropriation by way of storage. Diversions for storage can be timed so that they do not interfer with the agricultural uses on the stream. Thus, water is available during the off-irrigation season and spring snow-melt run-off time, notwithstanding that the source of supply is highly appropriated during the middle and latter part of the irrigation season.

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This analyses treats the intended storage as being no larger than the actual intentions of the Applicant. The application in this matter is at odds with some of the testimony of the Applicant. The application, as written and noticed, seeks 167.10 acre feet of water, to be diverted and impounded in reservoirs of that same capacity. The Applicant, however, intends by his testimony to divert sufficient quantities to keep these reservoirs full. Such a practice would, of course, result in an appropriation in excess of the Applicant's announced intentions. The intention of the appropriator frames the measure of the appropriation. See Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912), Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900). Therefore, this Applicant is entitled to a maximum 167.1 acre foot draw on the source annually, and cannot exceed this announced intention by drawing off his reservoirs and refilling the same.

Seen in this manner, the Applicant's announced intentions to divert throughout the year is difficult to justify. Diversions for storage can safely be limited hereunder to the period running from September 15 - June 15 of any given year. If the Applicant cannot secure his full measure in this period, it is probably that he never will in that year, with this junior priority date, and thus there is no reason to authorize diversions for storage at times of maximum direct flow use of the source.

Finally, it should be plain that the Aplicant must charge to its appropriative limit any carry-over from the previous year. Because this Applicant intends to divert for a quantity of water

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equal to the capacity of its reservoirs for use on an annual basis, any water remaining in storage from the preceeding year must be considered as part and parcel of the current year's appropriative limit. Solely because of the Applicant's intentions, the storage appropriation is limited to a single fill of the storage structure. See In re Monforton, Dept. Order, see generally Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941). The size or capacity of the diversion works fashion only the uppermost limit on the appropriation, the actual measure of the latter being the quantity needed for the particular appropriative intent disclosed. See Bailey, supra, Mordan, supra.

The Applicant's claim for direct flow use finds itself in a different posture. Firstly, it will be be noted that the mere fact that these waters may pass through the storage structure does not make them stored waters. A wide spot in a ditch is not a storage appropriation. Direct flow and storage rights are different creatures with different incidents, and are spawned by different appropriative intents. In re Monforton, Dept. Order, In re Brown, Dept. Order, compare MCA 85-2-302 with 85-2-305. Thus, the claim for 5.63 cfs up to 252.2 acre feet must be analyzed as a direct flow use. The diversion and use of this water will compete directly with other ongoing agricultural uses out of Isaac Creek.

The focus of the inquiry is whether the Applicant's proposed diversions will for all practical purposes always need to be curtailed in any given time frame in deference to senior demand.

The permit scheme is not a replacement for the need of administration of rights on a stream according to the priorities thereon, but rather merely blocks use that would otherwise always have to be curtailed in light of the existing demand on the source. In re Monforton, Dept. Order, (appeal pending).

Given this limited focus, there is unappropriated water available for the Applicant's proposed use throughout the period requested which can be diverted without adverse effect to other appropriators. The rub in the Applicant's claim will occur in late July and August in many years. Shortages are common during this period. Thus, while it is apparent that there will be many years where the Applicant's diversions will have to be curtailed in deference to senior demand, the Applicant is nonetheless entitled by the terms hereof to divert water in water-rich years according to the junior priority date that is part and parcel of his underlying interest.

Change Application

The Applicant's desire to change an existing right is mired in an evidentiary morass. The legal principles defining the scope of the inquiry are described in the attached memorandum.

The only salient conclusion apparent from the record is that the Applicant's proposed irrigation of the 58.1 acres would amount to an increase in the quantity historically used at the Scheffer place. This increase cannot be subsumed within the priority date attendant to the asserted existing right without injury to the Objectors' vested rights to maintenance of the

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stream conditions as of the time of their respective appropriations. This is so even though the water demand attendant to the old place of use is equivalent for all practical purposes to the water demand at the new place of use. As explained in the attached memorandum, the relevant inquiry is whether the burden on the stream will be increased by the Appliant's proposed change. This decisional equation is not complete without an accounting of how the particular area was irrigated historically. Thus, even though the demand for water attendant to the irrigation of crops may be the same on the respective places of use, enlargements of appropriations threatening vested rights to maintenance of the stream conditions occur where the new place of use is irrigated on a significantly increased basis.

The Applicant's evidence on the historic use of water at the Scheffer place is practically no evidence at all. That is to say, neither the Appliant nor his witnesses pretends to know how the Scheffer place was historically irrigated. Instead, an SCS officially simply determined the acreage that was irrigated in the past, and devised a sprinkler irrigation system with sufficient capacity to supply water to this total place of use. This evidence simply shows the most water that could have ever been used at the Scheffer place on an annual basis. Because the maximum demand is only loosely tied to the historic use question, such evidence is largely immaterial, as it sets only a cap on the quantity that could otherwise answer to the historic use inquiry.

The Objector's evidence is more directed to the issue at stake. Since the Objectors' lived on the Scheffer place and observed the irrigation thereof, their testimony is given considerable weight. This testimony establishes that not all the acreage irrigated at the Scheffer place was customarily and regularly irrigated, either on an annual basis or across the years. Instead, the flood irrigation system at the Scheffer place moved water from place to place throughout the irrigating season, and some parcels of land were irrigated in some years but not others. In summary, the evidence establishes that all the land identified by the Applicant was irrigated at some time, but not continuously and regularly. Since the Applicant's sprinkler system, with its substantially greater efficiency, is now capable of such continuous and regular irrigation, a substantial increase in diversions over those made historically will occur unless this change is properly conditioned.

As noted in the attached memorandum (Addendum A), the seminal question in change proceedings is rarely whether the change can be approved, but rather what conditions must be imposed to assure that the changed use will not infringe on junior appropriator's vested rights to maintenance of the stream conditions as of the time of their appropriations. This issue, as the common law courts have observed, often requires supplementary proceedings. This practical result finds expression in the present proceedings. While the fact of injury is clear if the proposed change is approved according to the terms thereof, the measure

of such injury is not. No flow figures or measurements are available in the record to quantify the measure of injury in a way susceptible of execution. As the attached memorandum makes clear, such conditions effectuating the change must be sharply defined so as to complement the aim of the adjudication process to provide for an administratible stream.

Thus, at the very least, further proceedings must be had herein in order to define a proper condition that will effectuate some measure of the Applicant's proposed change, and still protect the Objector's vested rights to maintenance of the stream conditions. The most feasible way to devise such a condition is to focus on the changes inherent in the Applicant's replacement of the flood irrigation system with a sprinkler system, insofar as such changes provoke disruptions in the burden on the stream inherent in the historic use.

The Examiner is aware that the change in irrigation systems is not the focus of the present proceedings. Such a change was not applied for, nor was it the subject of public notice. Nor does the result herein inevitably determine that a change application should have been a condition precedent to the Applicant's use of a sprinkler system. The latter depends on whether the statutory language describing a change of "purpose of use," MCA 85-2-402(1), is read broadly (sprinkler irrigation to flood irrigation) or narrowly (purpose of use embraces only type of use - agriculture, mining, municipal, etc). It is arguable in view of the criminal penalties provided for in the Montana Water

Use Act, such provisions must be read narrowly in order that the same is not unconstitutionally vague. See generally Town of Pine Bluffs v. State Bd., (Wyo. 1982), 647 P.2d 1365.

Howver, even assuming that the use of a sprinkler irrigation system is not a change within the purview of Department authority, the effects of this alteration are relevant in devising conditions to alleviate injury where the change at issue is clearly within the jurisdiction of the agency. It is unfeasible to conjure any protective measure that would assure that the new 58.1 acre tract would be irrigated in the same fashion as the old 58.1 tract, where such acreages were historically part and parcel of a larger irrigation enterprise, and where the methods of such former irrigation have been altered in a manner that affects the total system.

No prejudice accrues to the Applicant in this regard, as the jurisdictional overtones do not moot the substantive character of his changes. That is to say, that an alteration in water use does not answer to the legislative description of administrative authority does not mean that such alterations are authorized whatever their import for other appropriators. Rights to maintenance of the stream conditions are vested property interests, and cannot be deemed dispensed with absent an administrative remedy. Increased diversions to serve the same place of use from the same point of diversion for the same purpose work enlargements of appropriations to the detriment of rights to maintenance of the stream conditions, notwithstanding that no "change" has taken place.

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Thus, the focus of the "conditioning phase" of these proceedings must on those modifications to the Applicant's plans that will make its new sprinkler irrigation system function in a manner largely akin to the old flood system. Moreover, these criteria must be largely ministerial in nature, so that the Applicant's changed right can be administered in an expedient fashion in line with the other priorities on the stream.

It is hoped that the parties hereto, with the assistance of the technical personnel of the Department, can reach a meeting of the minds regarding proper conditions As explained in the attached memorandum, the doctrine of an historic use is an abstraction derived from the constantly varying water demands attendant to the historic irrigation practices. The present record is only sufficient to select a single number out of this range to limit future diversions by. This approach inevitably hurts one party in some years, and helps that party in others. However, the relative advantages may not synchonize with the actual agricultural plans of the irrigator.

The parties are in the best position to ascertain what conditions are best suited to serve their own agricultural interests. Thus, diversion rates can be varied according to the various months comprising the historic period of use, or diversions may be tied to measurements of stream flow on an annual basis. The record discloses some fertile territory in this regard. The "critical" season for the Objectors is August, so perhaps these objectors would be willing to forego some measure of their claims in early months for greater returns in

August, or perhaps diversions can be rotated between these competing parties in August to allow each a full head during part of the month. Innovative approaches are possible to tailor the remedy to the maximum benefit of each party. See generally, Cache LaPoudre Water Users Ass'n v. Glacier Meadows, 191 Colo. 53, 550 P.2d 288 (1976), Kelly Ranch v. Southeastern Colo. Water Conservation Dist., 191 Colo. 65, 550 P.2d 297 (1977).

In the event that no agreement can be reached, either party to this proceeding can petition the Department to commence a hearing on the question of what diverison rate Applicant's changed use should be limited to, which diversion rate shall reflect the "average" diversion associated with historic use.

Doctrinally, the result herein is premised both on the Objector's proof of the fact of injury related to the change, and the Applicant's failure to prove by a preponderance the diversion rate of the existing right that is the subject of his change. In re Meadowlakes, Dept. Order, firmly establishes that the Applicant has the burden of the question of the existence of a right that can be changed. Diversion rates are an integral component of this underlying interest. MCA 85-2-234(4)(b).

The proof fails here for precisely the same reasons that the historic use is immeasurable. The data of the SCS engineer and the reference in the Montana water survey, while sufficient to form a prima facie case, fail in the face of the Objector's evidence. However, because the average historic use will be less than the "adjudicated" flow rate (because the description of the

right only sets the cap of the appropriation) no prejudice accrues in light of this disposition. It can safely be ignored for the purposes of devising conditions.

The "notices of appropriation" submitted by this Applicant do not salvage the evidentiary failure. Such notices do not supplant the need for independent proof of use over a reasonable period of time. See Addendum B, see also Griffel v. Cove Ditch Co., 41 St. Rep. 1 (1984), 79 Ranch, Inc. v. Pitsch, 666 P.2d 213 (1983).

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ADDENDUM A

Change of Water Right

Historical Use

At common law, the measure of an appropriation was framed by that quantity of water put to beneficial use over a reasonable period of time. Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922). Thus, in Whitcomb v. Helena Water Works Co., 151 Mont. 443, P.2d 301 (1968), the defendant City was enjoined from refilling its reservoir during late summer months where such diversions took water historically relied on by downstream juniors. The court held that such late summer diversions were an extension of the historic diversion practices of the City, and that therefore such addtional diversions constituted an enlargement of the original appropriation. An enlargement of the original appropriation is in law the birth of a new appropriation with a priority date attendant to the initiation of the new use.

Similarily, in Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911) the court observed that a change in a portion of a right historically devoted to placer mining to an agricultural enterprise resulted in an increase in the historic consumption of the right. The Court held that such an increase in consumption resulted in a new appropriation to the extent of the increased use. See also Head v. Hale, 38 Mont. 302, 100 P. 222 (1909) (increase of use amounts to new appropriation), but see generally, Ragnell v. Lemery, 40 St. Rep. 58 (1983) (adding storage to direct flow right to extend use not injury).

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Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940), is to the same effect. There, against the claims of upstream juniors, a downstream appropriator was limited to his historical use under his adjudicated right. That is to say, the downstream senior was prohibited from extending his use to provide for a fish pond and swimming hole, where the historical use was confined to irrigation. Such an extension of use amounted to a new appropriation. See generally Cate v. Hargrove, 41 St. Rep. (1984).

The threshold question herein is the relevance of this "doctrine of historic use" to a proceeding focusing on whether the change asserted will adversely affect other appropriators. MCA 85-2-402. Stated more particularly, the issue is one of whether those activities that alter the historic use of a water so as to increase the burden on the source of supply fall within the rubric of a "change of water right."

In re Meadowlark Estates, Dept. Order, goes part way to at least framing the issue. Therein, the Department determined that an applicant for a change of water right is implicitly required by the statutes to make a prima facie showing of the existence of a water right that is the subject matter of the proposed change. In a change of water right proceeding, the legislature implicitly assumed that a water right existed, and an applicant for a change must show in an evidentiary way the existence of the same in order to have "standing" to involve the statutory process for the change of underlying interest. Stated another way, the statutes

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do not contemplate that the Department will approve a change of an interest that is nonexistent. See Pet. for Change, Etc., v. St. Bd. of Control, (Wyo. 1982) 649 P.2d 657 (1982).

Bozeman has, of course, complied with the narrow holding of Meadowlakes. The rights Bozeman seeks to change are decreed. "Adjudicated" rights, even prior to the present adjudication procedures, are prima facie evidence of the existence of the described interest, even as against those not party to the original decree. See Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927), Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940), Sherlock v. Greaves, 106 Mont. 206, 76 P.2d 87 (1938), Mills v. Morris, 100 Mont. 514, 50 P.2d 862 (1935). (For a discussion of the burden to show legal title in the interest, see Burden of Proof, infra.)

Of more central importance to the present inquiry is the observation in Meadowlakes that a studied indifference to the question fo the existence of the underlying right is at odds with the overriding purpose of the permit process. Meadowlakes recognizes that the permit/change provisions of the Montana Water Use Act are part of a constitutional and legislative overhaul of the water right system. The permit/change provisions are an implementation of the constitutional command to "provide for the administration, control, and regulation of water rights," and to provide for "a system of centralized records" for the same. Mont. Const., Art. IX, Sec. 3(4), see also MCA 85-2-101(2).

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The consistent theme of Meadowlakes and Monforton, supra, is that this collection of centralized records would be of little value or impact if it represented a mere collection of paper filings bearing little or no relationship to actual uses on a stream. Refusing to countenance an expansion of use attendant to a disruption implicit in a change of water right contributes to a "centralized record" of paper filings.

The doctrine of historic use differs from the question of the existence of the underlying right only in the scope of the scrutiny of the underlying right. Adjudications cannot feasibly set limits on an hour-to-hour or day-to-day basis. Hence, the adjudicated limit only describes the most water that can be reasonably used for the claimed use. Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905). For example, an irrigator may claim sufficient water to irrigate his place of use in a drought year (no precipitation), notwithstanding that his customary use of the source will normally be less (some precipitation).

Enlargements of appropriations occur, however, not only by exceeding the "drought" levels prescribed in the decree, but also by management factors that tend to increase the demand on the source toward drought levels by increasing the place of use or by increasing the consumption of water. See Petition for Change, Etc. v. State Board of Control, supra. That is to say, enlargements of appropriations are reflected by increasing demands attendant to changes in the historic practice of exercising the adjudicated right.

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This principle is reflected not only in the foregoing Montana cases, but in practically every state adhering to the prior appropriation doctrine. See Oliver v. Skinner, 190 Ore. 423, 226 P.2d 507 (1957), Tudor v. Jaca, 178 Ore. 126, 165 P.2d 770 (1946), Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534 (1868), Jensen v. Birch Creek Ranch Co., 76 Utah 356, 289 P. 1097 (1930), Gunnison Irrig. Co. v. Gunnison Highland Canal Co., 52 Utah 347, 174 P. 852 (1918), Twaddle v. Winters, 29 Nev. 88, 85 P.280 (1906), Johnston v. Little Horse Creek Irrig. Co., 13 Wyo. 208, 79 P. 22 (1904), Clough v. Wing, 2 Ariz. 371, 17 P. 453 (1888)), Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962), Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954), Baecher v. Cassia Creek Irrig. Co., 66 Idaho 1, 154 P.2d 507 (1944), Colorado Springs v. Juat, 126 Colo. 289, 249 P.2d 151 (1952), Enlarged Southside Irrigation Co. v. Johns Flood Ditch Co., 116 Colo. 589, 183 P.2d 556 (1947). Thus so much of Meadowlakes that reflected a concern for the prevention of the bootstrapping of new uses to old priority dates is equally applicable under the historic use doctrine.

The Hearings Examiner understands that some Montana cases seem to speak in a contrary way as to the applicability of the historic use doctrine to change proceedings. In transbasin diversions cases, Montana has seemed to say that juniors in the basin of origin cannot as a matter of law be adversely affectd by a change in the basin of use. Since any return flows of the former use could not be available to juniors in the basin of origin, changes in that return flow attendant to the changed use

cannot work injury. See Thrasher v. Mannix & Wilson, 95 Mont. 273, 26 P.2d 370 (1933); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972). This approach ignores, of course, the factual inquiry of whether there has been an increase in the historic diversions in the basin of origin in order to serve the changed use.

Similarly, Montana courts have commonly observed that no change in a water right can adversely affect an upstream junior. See Pack v. Simon, 101 Mont. 12, 52 P.2d 164 (1935), Osnes Livestock Co. v. Warren, 103 Mont. 284, 62 P.2d 206 (1936), but see Quigley v. McIntosh, supra. This, of course, is only true if the downstream senior is not increasing his historic use by the change, and only if such increase is immaterial as a matter of law to a "change-related" complaint.[1]

The invitation to focus solely on return flow disruptions seems enticed by a concern that a focus on the point of diversion by an administrative agency would amount to an invalid adjudication. The flavor of this reasoning appears most pronounced in the jurisdiction of Utah. See Crafts v. Hansen, (Utah 1983), 667 P.2d 1068, United States v. District Court, 121 Utah 18, 2421 P.2d 774 (1952), Piute Reservoir & Irrigation & Reservoir Co., 13 Utah 2d 6, 367 P.2d 855 (1962). Because of the fear of administrative excess, Utah applies the test of is there reason to believe that the proposed change could be implemented without adverse effect to existing rights. The nub of this position is reflected by some of the early decisions of this

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agency, to the effect that an applicant for a change need only show that his diversion works are administratible in deference to junior's rights to maintenance of the stream conditions.

W.S. Ranch Company v. Kaiser Steel Corporation, (N.M. 1968), 439 P.2d 714, reflects a similar posture. Therein, the court held that the adjudicated quantity must remain sacrosanct, notwithstanding a claim that a move downstream in the point of diversion would allow the claimant a greater quantity of water on a gaining stream. Curiously, and perhaps paradoxically, the court also observed that the claimant could not divert more downstream than he had upstream.

W.S. Ranch Company is against the weight of authority in the Western states, and is inconsistent with Montana law. See Quigley, supra, Faathermann v. Hennessy, 43 Mont. 310, 115 P. 983 (1911), C.C. Cate v. Hargrave, 41 St. Rep. (1984), (historical use "fills in" decree), McIntosh, supra (no proof of gain in move downstream), see also Hamilton v. Town of Crawford, 592 P.2d 1327 (Colo. 1979) (decree embraces only that source of supply historically relied on), Dominiecki v. McIntyre Livestock Corp., (Colo. 1981), 633 P.2d 1064. The adjudication process assumes the operation of the historical use doctrine. Quigley v. McIntosh, supra, Brennan v. Jones, 101 Mont. 550, 55 P.2d 697 (1936). Focusing on the underlying concept in a change proceeding implements the decree rather than undermines the judicial product.[8]

Moreover, acknowledging the historic use doctrine in a change proceeding complements the aim of the adjudication process to provide for an administratible stream. There can be no gainsaying that without a comprehensive adjudication, it is better to be upstream with a shovel rather that downstream with a priority, if only for the difficulties of administering water rights. See generally, State v. Pecos Cty. Artes. Conservancy Dist., (N.M. (1983), 663 P.2d 358. ("The object of an adjudication suit is to determine all claims to the use of the water in a given stream system in order to facilitate the administration of unappropriated waters and to aid in the distribution of waters already appropriated.") The constitutional provision and corresponding statutes of this State expressly recognize the one of the goals of the new system so as to provide for the regulation of water rights.

The early adjudication procedures were flawed because not all of the users were before the court. See generally, Stone, Are there Any Adjudicated Streams in Montana?, 19 Mont. L. Rev. 249, Stone, Problems Arising Out of Montana's Law of Water Rights, 27 Mont. L. REv. 1 (1965), Anaconda Nat. Bank v. Johnson, 75 Mont. 401, 244 P. 141 (1926). Therefore, the decree culminating the process could never be executed as against absent appropriators. Without an opportunity to be heard by each water user, and a decree specific enough to allow for administration, the day-to-day regulation of rights according to the priorities thereof inevitably floundered. See generally, State ex rel. Rosch v. District Court, 56 Mont. 578, 185 P. 1112 (1919), State ex rel. Reeder v. District Court, 100 Mont. 376, 47 P.2d 653 (1935).

The change proceeding should not be read so narrowly that it frustrates the purposes of an adjudication. Ignoring any "change-related" impact breeds the same frustrations that were endemic to the former system. The W.S. Kaiser approach, even assuming that it limits an appropriator to the water historically available to him, handicaps the administration of rights because it does not quantify the underlying historic use in a way susceptible of execution. Thus, such a system necessitates more hearings in order to effectuate the exercise of the underlying priority as against the claims of others. The State may not act summarily where issues of fact are outstanding. See Montana Power Company v. Public Service Commission, 41 St. Rep. 1712 (1984), Fuentes v. Shevin, 407 U.S. 67 (1972), North Georgia Finishing, Inc. v. Di-chem, Inc., 419 U.S 601 (1975). Moreover, the controversy must be resolved in definite terms so that the result thereof may be administered in a largely ministerial fashion. See generally, Endicott-Johnson Corporation v. Encyclopedicia Press, Inc., 266 U.S. 285 (1924), MCA 85-5-101 et seq., Holmstrom Land Co. v. Ward Paper Box, 36 St. Rep. 1403, 605 P.2d 1060 (1979). These factors argue strongly for administrative jurisdiction over all facets of change-related impacts. See generally, Huff v. Bretz, 285 Or. 507, 592 P.2d 204 (change proceedings are designed to correct difficulties inherent in unrestrained changes, and thus exist for the benefit of public generally).

Similarly, focusing on and quantifying disruptions in historic use gives effect to future appropriators' vested rights to maintenance of the conditions as of the time of their respective appropriations. The impetus toward reuse and development of the water resource this doctrine serves is substantially undermined where the parameters that describe such conditions are not defined. It is the "legal" conditions on the stream that an appropriator's right attaches to, see Harvey v. Davis, (Colo. 1982), 655 P.2d 418, and to the extent that these conditions remain undefined, the substantive protections intended are eroded and frustrated by the uncertainty attendant to estimating exactly what the stream conditions are. See also Addendum A.

Finally, In re Brown largely dispels the specter that an administrative inquiry into an existing right amounts to an invalid adjudication. Therein, it was observed that such an argument was premised on a faulty syllogism. It does not follow that since an adjudication involves an interpretation and determination of an existing right, all proceedings, whatever their purpose and character, also involve an adjudication if an accounting of an existing right takes place therein. Even a rejection of an application for change for failure to show an existing right cannot be read as adjudicating the "nonexistence" of the underlying right. It is well settled that collateral estoppel or res judicata will not be where the character and purpose of the proceedings differ, there being in such situations marked differences in the incentive to litigate any particular

issue. See generally, Restatement (Second) of Judgments, §88, §68.1.

In a similar way, an examination of any objector's water rights hardly equates to an adjudication of that right. Objectors' water uses are material to a change proceeding only to the extent that such uses define one's vested rights to maintenance of the stream conditions. A determination of these rights to maintenance of the stream conditions cannot adjudicate the underlying interest. Even if one's objections to a proposed change are dismissed, it hardly follows that one cannot continue to divert according to the priority attached to the underlying right. Instead, such a rejection only determines that the changed conditions proposed by an applicant do not disturb the rights to maintenance of the stream conditions implicit in the water use sought to be protected.

An adjudication, it must be noted, merely confirms preexisting rights. See Crisson Consolidated Gold Mining Co. v. Whitten, 139 Colo. 273, 338 P.2d 278; Cline v. Whitten, 144 Colo. 126, 355 P.2d 306 (1960). Adjudications reflect the fact that all steps necessary to the culmination of an appropriation have been taken. See Southeastern Colo. Water Cons. Dist. v. Rich, (Colo. 1981), 625 P.2d 977 (1981). Since nothing in this proceeding can, by virtue of the character of the proceeding, have anything to do with the salient issues in an adjudication, it follows that any result herein cannot infringe upon judicial authority. Weibert v. Rothe Bros., Inc., (Colo. 1980), 618 P.2d 1367).

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This result is also compelled solely as a practical matter in effectuating changes of water rights. The doctrine of historic use, although speaking to enlargements of use, is nothing more than a backhanded way of describing other appropriator's vested rights to maintenance of the stream conditions. That is to say, enlargements of use are significant precisely because they change the stream conditions to the detriment of junior appropriators. See Quigley v. McIntosh, supra. The doctrine of historic use gives effect to the implied limitations read into every decreed right that an appropriator has no right to waste water or to otherwise expand his appropriation to the detriment of juniors. See Maibert v. Rothe Bros., Inc., supra, Green v. Chaffee Ditch Co., supra, Farmer's Highline Canal, supra, Danielson v. Kerbs Ag., Inc., (Colo. 1982), 646 P.2d 363, Rominiecki v. McIntyre Livestock Corp., (Colo. 1981), 633 P.2d 1064

> We are committed to the rule that the appropriator of a water right does not own the water, but has the ownership in its use only. (Creek v. Bozeman Water Works Co., 15 Mont. 121, 38 Pac. 459; Allen v. Petrick, 69 Mont. 373, 222 Pac. 451; Verwolf v. Low Line Irr. Co., 70 Mont. 570, 227 Pac. 68; Tucker v. Missoula Light & Ry. Co., 77 Mont. 91, 250 Pac. 11; Maclay v. Missoula Irr. Dist., 90 Mont. 344, 3 Pac. (2d) 286; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 Pac. (2d) 1074, 89 A.L.R. 200.) Likewise it is settled by the decisions of this court that such a right is property which may be disposed of apart from the land on which it has been used. (Smith v. Denniff, 24 Mont. 20, 60 Pac. 398, 81 Am. St. Rep. 408, 50 L.R.A. 737; Lensing v. Day & Hansen Security Co., 67 Mont. 382, 215 Pac. 999; Maclay v. Missoula Irr. Dist., supra.)

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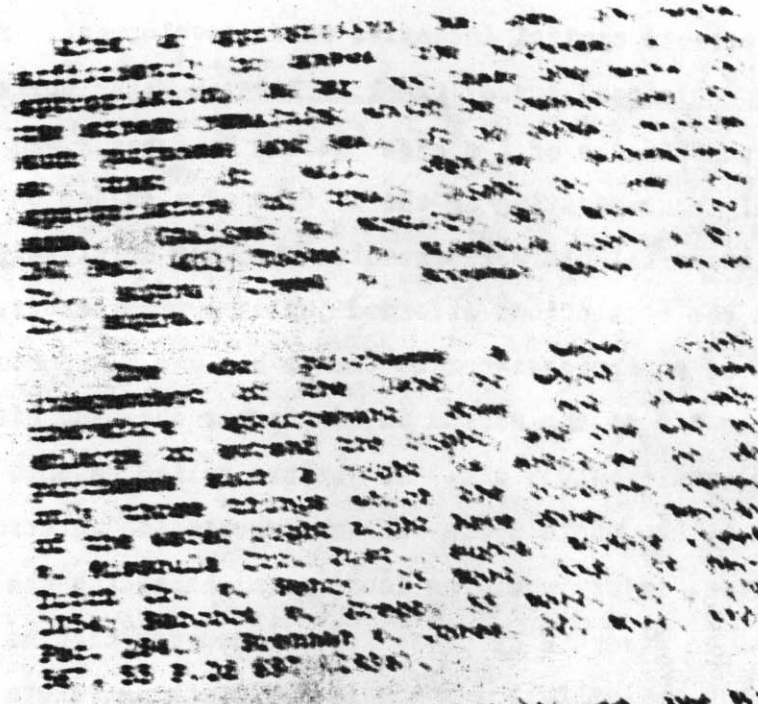

The decree that defined the particular use must be read against a backdrop that prescribes the waste of the water resource and confines the use of the appropriation to such times and in such measure that water is actually needed for the defined purpose. See Clark v. Keibel, 112 Mont. 541, 121 P.2d 137 (1940), Ricker v. Missoula Light & W. Co., 73 Mont. 91, 235 P. 11 (1926), Clausen v. Arrington, 121 Mont. 1, 212 P.2d 1049 (1949). The pattern of use these concepts serve to define are the "conditions of the stream" subsequent appropriators have vested property interests in. Because of the scarcity of water in the arid West, the doctrine of appropriation accords property interests in such stream conditions in order to provide security for the development of water. That is to say, the doctrine of vested rights to maintenance of the stream conditions prevailing

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security in the flow of waters against the acts of others in order to promote capital intensive water development. See Quigley v. McIntosh, supra; Creek v. Bozeman Water Works, supra. Ignoring the effects of a change "at the headgate," and exclusively concentrating on the effects of a change on the return flows available works results that are completely out of line with the protections afforded junior appropriators, and with the right of an appropriator to change his use. Suppose X returned 10 cfs to the stream in his former use, and his proposed use would return only 5 cfs. If juniors relied on this 10 cfs flow, and if the whole focus was on the changing pattern of return flows, injury would be found notwithstanding the fact that X intended to divert 5 cfs less for his new use that he had historically. Similarly, X may leave 10 cfs as return flow in both his new and former use, and hence under a restricted inquiry the new use would not cause injury, notwithstanding the fact that the former use was exercised only periodically as a supplemental irrigation supply, while the new use entails constant diversions for a new industrial use.

The ultimate test for the protection of junior's vested rights to maintenance of the stream conditions is whether the "burden on the stream" will be changed by the altered conditions. This requires an accounting of the loss to the stream by the old and new use respectively. An accounting cannot properly be completed where types of credits and debits are excluded from the underlying equation. Nor can proper conditions

be imposed to protect other appropriators and effectuate changes where central parts of the inquiry are studiously ignored. See generally Addendum A. Since it is not lightly to be inferred that the legislature withheld seminal parts of the relevant inquiry when it afforded the Department jurisdiction over changes of water rights, I determine that the historic use reflected by the Lichtenberg right is within the jurisdiction of the Department. The tail must go with the hide.

Application of Historic Use Doctrine

Changes of agricultural rights to municipal purposes raise common problems in effectuating the change without injury to other appropriators.

> Plaintiff's action against the City of Westminister is but one of several cases in this jurisdiction involving a municipality's purchase of agricultural water rights with the intention of devoting such rights to municipal and domestic purposes. The municipality, of course, has the legal right to devote its acquired water rights to municipal uses, provided that no injury accrues to the vested rights of other appropriators. Farmers Highline Canal & Reservoir Co. v. City of Golden, supra; Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P. 313; Hutchins, Law of Water Rights in the West 384 (1942). The principal dangers attending the municipality's altered use are that the city will attempt to use a continuous flow, where the city's grantor only used the water for intermittent irrigation; Baker v. City of Pueblo, 87 Colo. 489, 289 P. 603; and that the municipality will enlarge its use of the water to the full extent of the decreed rights, regardless of historical usage.

Green v. Chaffee Ditch Co., supra; Farmers Highline Canal & Reservoir Co. v. City of Golden, supra; Farmers Reservoir & Irrigation Co. v. Town of Lafayette, 93 Colo. 173, 24 P.2d 756. To protect against the possibility of such extended use of the water rights, the courts will impose conditions upon the change of use and point of diversion sufficient to protect the rights of other appropriators. We have reviewed and upheld such restrictive conditions in numerous cases. See, e.g., Boulder & White Rock Ditch & Reservoir Co. v. City of Boulder, 1157 Colo. 197, 402 P.2d 71; City of Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151; Brighton Ditch Co. v. City of Englewood, 124 Colo. 366, 237 P.2d 115; Farmers Reservoir & Irrigation Co. v. Town of Lafayette, supra.

Westminister v. Church, (Colo.), 445 P.2d 52, 58.

Similarly in this case, the issue presented by the evidence is whether the City's proposed municipal use will result in an enlargement of use either in time or quantity, see Colorado Springs v. Yust, supra, out of the Lichtenberg right. The evidence shows that unless the City's use is properly conditioned, the City's use will result in just such an expansion to the detriment of junior appropriators.'

The City has applied to use the Lichtenberg right from April 15 through October 15. While this period is generally within the irrigation season, the evidence shows that the actual use of the Lichtenberg right was confined to the 90 day period of June, July, August. Moreover, the evidence shows that the water was used regularly within this period only for approximately 40 days. The customary pattern of water use was reflected by an

irrigation of the hay crop around June 1, followed by an irrigation of the grain crops around July 1, followed by a second irrigation of the hay crop in August.

The City must be limited to those times that the Lichtenberg right has been exercised historically. Galiger v. McNulty, 80 Mont. 339, 260 P. 4 ; (1927), Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), Quigley v. McIntosh, supra. An appropriate estimate of such times is May 25-June 10, June 25-July 10, and August 1-August 10.

The Hearings Examiner is aware that some of the evidence indicates a longer period of customary use. However, as discussed below, the historical use doctrine is necessarily an abstraction, and at any event, in view of the labor requirements in the early season, additional use seemed to depend on whether the Lichtenberg rights could be exercised in August. The evidence shows that August diversions were often curtailed for all but Lichtenberg's most senior right. Thus, little prejudice accrues to the City, and at any event, the 40 day figure is sponsored by a witness for the City.

Consumptive Use

The City's evidence herein is geared toward quantifying the consumptive use of the Lichtenberg right. The amount of water consumed or used up and lost to the stream system is relevant to the injury equation because the use of such water cannot affect other water users. It simply was not available to them.

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It should be emphasized, however, that consumptive use is not the necessary measure of the quantity that can be transferred in all cases. Rather, it sets the minimum level of water that can be changed. It is perfectly possible that an appropriator may be able to change without injury substantailly more than he historically consumed. Whether or not any appropriator is so entitled depends on whether the return flows accruing from his former use were in turn depended upon by other appropriators. Consumption is not in and of itself the legal barometer of the right to change. Rather, it is relevant only as it relates to the question of injury.

Consumptive use is critical herein, however, because the City has made it such. In short, the City claims to change only that amount consumed out of the Lichtenberg rights. Thus, whether or not the return flows, including those waters percolating back to the stream, from the Lichtenberg right augmented Hyalite Creek at times when the Objectors were using water is immaterial.

The return flow issue does dispose, however, of any claims of injury to those located downstream from the confluence of Muddle Creek and the East Gallatin. While the City's diversions will be 100% consumptive to those users on Hyalite, they will result in a net increase in water at points downstream from the East Gallatin point of return. This is so because a municipal use is inherently less consumptive than an agricultural one. Although lawn watering is likely to equal, if not exceed, the consumption of crops, all the other uses under the municipal rubric are likely to be only marginally consumptive.

The City has used the Blaney-Criddle method of estimating crop consumption attendant to the old use. Because of the paucity of records of diversions, and because of the practical difficulties in measuring return flows, the Blaney-Criddle methodology is a reasonable and well-accepted technique. See Blaney and Criddle, Determining Water Requirements for Settling Water Disputes, 4 Nat. Resources J. 29 (1964).

The City errs not with the methodology employed, but rather in the data utilized in exercising that methodology. The City assumed that all of the acres formerly irrigated were devoted to alfalfa production. In fact, for at least two decades, 1/3 of the land was fallow. Therefore, because the measure of the underlying right is limited by historic use, a 1/3 reduction must be made in the City's land base in the Blaney-Criddle formula.

The resulting measurement must be further reduced by the additional 1/3 land area devoted to grains. Alfalfa is a notoriously ravid consumer of water. Ignoring the historical single cut of grain and replacing it with double cuts of a water-loving species will tend to significantly overstate consumption.

This total must be still further reduced to reflect the contribution of rainfall. The crop requirement estimated by the Blaney-Criddle method must be reduced by the contribution of precipitation to that crop need. The City recognized this, but used a drought year in fashioning this reduction. While the end result may be descriptive of the consumption of the Henry

Monforton place in such a water short year, it is not by definition characteristic of consumption in the average or normal year.

The effects of the foregoing reductions is reflected in the cross-examination of Mr. Brown. The only error therein is averaging the alfalfa and grain irrigation requirements and extending the same across the irrigation season. Grain requires and has historically been given only one irrigation. The doubling involved in the alfalfa calculation for two cuttings overstates consumption for grain. Correcting for the same, and using the methodology employed in Exhibit 2E, the average annual consumption at the Monforton place by the crops is 206.67 acre feet. (10.35-12=.86 acre feet; .86(250x1/3)=71.66; 14.82-12=1.24 acre feet; 1.24(250x1/3)x2=206.67; 206.67+7.66=278.33 irrigation requirement).

This quantity must be expanded to reflect the additional quantity of water lost to the stream system as a result of inefficiencies in the diversion system. That is to say, some of the water diverted will be lost to the stream system even though the crops themselves don't utilize it. The Applicant estimated these losses by assuming a 55% overall efficiency factor for Lichtenberg's flood irrigation practices, thereby arriving at a gross diverison rate from the net irrigation requirements. The Applicant then assumed that 25% of the difference between the gross diversion and the net irrigation requirements would be lost to such things as evaporation, plants excluding crops, and deep percolation.

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The 55% efficiency factor was a "ballpark" selection with no individual regard for the particular circumstances attendant to the exercise of the Lichtenberg right. Nonetheless, I accept it as reasonable, primarily because any prejudice accrues to the City who sponsored the testimony. I conclude generally that Lichtenberg's diversion efficiencies are likely to be toward the upper end of the efficiencies commonly associated with the flood irrigation, because of the highly efficient ditch system. The right at issue herein was diverted out of the Cottonwood Canal, a "community canal" serving many users. Whether or not Lichtenberg had a right to so divert is immaterial. Such diversions were exercised historically, and thus they quantify the right for the purposes herein. Thus, losses out of the head ditch were minimized because of the pro rata contribution to such losses by other rights in the ditch.

The 25% loss factor is much more difficult to justify. The figure is premised on a 1952 study for the entire Gallatin Valley by the Bureau of Reclamation. The study is not part of the record, and thus we are left to guess whether the Lichtenberg land and irrigation practices bear a close relationship with the object of the 1952 study. I understand that the measurement of such losses must inevitably remain an estimate, but a citation to an old study on the entire Gallatin Valley is not much help in deciding the historical losses at issue herein. I construe the study, therefore, to yield an average figure for losses in the Gallatin Valley. Since losses out of the ditch are minimal, and

since the Jones place is relatively adjacent to the source of supply (thereby indicating that the lands underneath will be at least partially saturated), I conclude that 10% of the inefficiencies associated with the ditch system will be lost to the source of supply.

Therefore, using a 55% gross efficiency on a 1278.3 net irrigation requirement, we arrive at a 506.05 gross acre feet diversion. Taking 10% of the difference (227.72), we arrive at a 22.77 acre foot loss to the stream system as a result of inefficiencies. Thus, the total historic consumption associated with the Lichtenberg right is 301 acre feet per annum. Over a forty day period, it would take a 3.8 cfs flow to divert 301 acre feet. Thus, the City is entitled to 3.8 cfs not to exceed 301 acre feet annually.

The Nature of Historic Use

It must be conceded that the doctrine of historic use is an abstraction bearing only an an attenuated connection to the actual irrigation practices associated with the Monforton place at any given time. Obviously, the irrigation of the Monforton or Jones place throughout history varied significantly depending on climatic factors, including temperature and precipitation, the water available in the source of supply, and the management decisions of the irrigators. These factors governing the historic water use, howeer, will be supplanted by new criteria that will govern the City's diversions. Since the pattern of need for a municipal use varies substantially for that of

agriculture, it is necessary to condition the new municipal use in such a fashion that it parallels the historic pattern of need for agriculture.

On this record, the only feasible way of making this municipal right function as an agricultural one is to look to average water years and the characteristic land management scheme. See Westminister v. Church, supra (running ten year average). Thus, in the above analysis, wet years and dry years are ignored in favor of average years. On this record, this is the only feasible way of defining Lichtenberg's property interest inherent in his right to sale in contract with the Objector's property interests in maintenance of the stream conditions. While a more sophisticated approach is possible in this diversion (correlating diversions with snowpack conditions), the record is insufficient to detail such a remedy.

Just as average conditions keynote the physical aspects of water demand, characteristic or average practices of land management control the base for water demand. It is clear from the evidence that Mr. Lichtenberg in at least some years in the recent past has eliminated fallow and pushed hay. However, this practice was not characteristic of the Monforton place over the long term.

It is, of course, evident that the rights incident to an appropriation should not be read so narrowly that the flexibility necessary to a successful farming operation is frustrated. However, it appears from the evidence that the Monforton place was a grain-oriented enterprise through a substantial period of

time. Grain production was limited, however, by ASCA standards, presumably attendant to some sort of pure support program. This enterprise cannot be changed now to an intensive hay system, with its substantially greater water requirements, without resulting in an enlargement of use that would tread on other appropriator's rights to maintenance of the stream conditions, unless a new priority date is assigned that increment of increased usage. McPhee v. Kelsey, 44 Ore. 193, 75 P. 401 (1903), Oliver v. Skinner, 190 Ore. 423, 226 P.2d 507 (1951).

Conditioning Changes To Yield New Uses

As noted above, Bozeman's application for a change of water right must be denied in part because it would otherwise constitute an enlargement of use to the detriment of the Objectors' rights to maintenance of the stream conditions. In effect, this conclusion reflects the corollary that the proposed use cannot be protected by the original priority date attendant to the old use. The impending question is whether the lost increment of use can be reflected by a priority date corresponding to the time of filing.

Change proceedings and new permit proceedings are statutorily distinct, with differing standards governing each. Compare MCA 85-2-311 with MCA 85-2-402. As such, it seems clear that one cannot, at the minimum, be awarded the substance of a new water use permit without complying with the substantive criteria for issuance of such a permit. Any other result puts form over substance, and subverts the legislative intent inherent in the

provisions providing for a new water use permit. Thus, the inquiry herein is limited to the question of whether a water right with a new priority date can be assigned that increment of water use claimed by Bozeman in its change that corresponds with the September 15 - October 15 period. No present need for water has been shown at any other time within the time of use proposed by Bozeman in its change application. Thus, even though present need limitations do not bind Bozeman in its attempt to secure a perfected right (although Bozeman cannot divert pursuant to that right until there is a present need), the change application cannot be conditioned to achieve the practical effect of a new water use permit in toto without a frustration of the legislative intent reflected in MCA 85-2-311.

The larger question is whether a right resembling a new water use permit can ever be yielded by conditioning a change application in view of the distinct statutory standards. Close analysis dictates that there are no practical reasons why such results cannot flow from a change proceeding, so long as the statutory standards for a new water use are respected.

Certainly the public notice given of the pendency of this change proceeding presents no real obstacle. Although the notice of Bozeman's application for change obviously does not indicate that Bozeman seeks a new water use permit, it does give notice that Bozeman claims the identical use under an earlier priority date. Since no complaint could be lodged as to notice if the change was approved according to the terms thereof, it follows

that no complaint can be heard if the water use proposed is granted with a more junior and hence inferior priority date.

For these reasons, rather than relegate Bozeman to the cumbersome procedure of refiling a new use application with this agency, provision has been made in Bozeman's new water use permit for a September 15 - October 15 use corresponding to the amount of present need during suhc period. The findings and conclusions entered in respect to Bozeman's new water use permit embrace the quantity of water needed during this period.

Burden of Proof

At common law, the burden of proof on the question of injury to vested rights to maintenance of the stream conditions was unequivocally on the complaining objectors. See Holmstrom Land Co., supra. For the reasons contained in Addendum A (Interlocutory Order, In re Beaverhead Partnership), the Hearings Examiner determines that the unitary system provided for in the Montana Water Use Act to determine change of water right issues implicitly requires tht the burden of persuasion be on the applicant for a change of water right, with a burden of production on each Objector to show the type and character of injury the proposed change threatens. (It is interesting to note in this general regard that virtually every appropriation state with similar change proceedings allocates at least some measure of the burden of proof to the applicant for a change. See generally, Meibert v. Rothe Bros., supra, Federal Land Bank v. Union Central Life Ins., 54 Idaho 161 29 P.2d 1009 (1934),

Rosvall v. Reynolds, 86 N.M. 249, 522 P.2d 796 (1974), Oliver v. Skinner, 190 Or. 423, 226 P.2d 507 (1951), Tanner v. Humphreys, 87 Utah 104, 48 P.2d 484 (1935.)

The allocation of the burden of proof is not material in the present circumstance, however. As noted elsewhere herein, the entire change proceeding was litigated by Bozeman on the premise that only the consumptive use associated with the Lichtenberg right would be changed. The Objectors cross-examined and introduced evidence, without objection, that described the historic exercise of the appropriative rights at issue. Moreover, the testimony is in large measure uncontradicted. Only the legal inferences to be drawn therefrom is at issue. In such circumstances, it makes no difference who holds the burden of proof. There are no material issues of fact that would materially affect the result.

The sole exception to this general observation is Middle Creek and Hoy Ditch Company's arguments that Bozeman has failed to show that it is the owner of the Lichtenberg rights. To this end, these Objectors propounded "evidence" consisting of certain deeds that are alleged to be in the chain of title of those lands the Lichtenberg rights were appurtenant to. These deeds would show that portions of the Lichtenberg rights have been previously conveyed, if one applies the presumption that only an express reservation of water rights is effective to sever such rights from a conveyance of the freehold they are appurtenant to. See MCA 85-2-403, Castillo v. Kunneman, infra.

One might dispose of this controversy solely on an evidentiary basis. These objectors' evidence in this regard was submitted during the deposition of Wayne Treers, a Bureau of Reclamation witness. Such evidence was clearly beyond the scope of Mr. Treer's testimony, and the City properly objected to it. Bozeman had no reason to suppose that such issues would be injected into the Bureau's claim of injury, and Mr. Treers plainly had no idea of what the documents purported to show, apart from what is otherwise clear from the face of the documents themselves. Under such circumstances, Bozeman was at the very least unfairly deprived of an opportunity to present rebuttal evidence.

This analysis assumes, of course, that the Meadowlakes rule does not embrace a requirement that an Applicant show not only the existence of a water right, but also the legal title to the particular right at issue. The Hearings Examiner determines that such an argument presses Meadowlakes too far, and indeed trespasses on domain outside of this agency's jurisdiction.

Bozeman's argument in this regard is well-directed, albeit mistakenly aimed. Bozeman argues as a matter of statutory construction that the exclusive focus of this proceeding is whether the change of water right will work injury; not whether Bozeman is the holder of the asserted water right. Meadowlakes answers, however, that the existence of a water right is implicity a criteria in a water right proceeding. The legislature assumed in providing for a change of water right that the applicant for the same was an appropriator. See discussion, supra.

However, the existence of a water right more closely dovetails with the overriding question of injury than does the subsidiary issue of whether the particular applicant is the one authorized to make the change. As previously noted, expansions of appropriations often work injury to property interests of others in maintenance of the stream conditions.

Where a person cannot show in an evidentiary way the existence of a right that can be changed, it is appropriate to conclude that such an applicant seeks in fact a new use to the extent of the failure of proof. Additions to the maximum quantity of water reasonably required for the original appropriation as per se new appropriations. In short, enlargements of appropriations work new priorities to offset potential injury.

The question of legal title to the right asserted involves injury to others, however, if and only if the applicant has no title to all or part of his appropriation, and only if the holders of such title are actually exercising their appropriative interest. That is to say, the actual holders of title to the appropriative interest must be exercising that interest, or at least have the intent to maintain that interest, before any change in stream conditions can occur.

Moreover, while it is apparent that ignoring the state of title does breed the danger of paper rights Meadowlakes was in part grounded on, this condition is endemic to circumstances where no adjudication has defined the underlying interest in relation to the particular appropriator. It does not of itself

argue for administrative jurisdiction over issues completely beyond the expertise of the participating agency. Change proceedings are by their nature ill-suited to quiet title. Westminister v. Church, supra. Resolution of the ownership issue involves issues and persons well beyond the purview of water-related matters.

It is enough that the Department not compound the difficulties left to the water courts by perpetuating the same conditions that engendered the need for such a state wide adjudication. Thus, it is appropriate that Bozeman be required to trace its authority over the right asserted herein to the statement of claim reflecting the Lichtenberg right in the adjudication procedures. The proper "forum" for such a showing is the water right transfer provisions. See MCA 85-2-421, et seq. Thus, Bozeman, as a condition precedent to the exercise of the rights provided for herein, must file sufficient water transfer forms to connect its title to a statement of claim deflecting the right asserted herein. This condition, along with the requirement of proof of a water right that can be changed, will go far to alleviate the nature of the problem the objectors define.

Trans-Basin Diversion

It will be noted that Bozeman's contemplated uses involve a trans-basin diversion, albeit of modest dimension. Bozeman will divert waters out of Hyalite or Middle Creek and ultimately transport the water so diverted to the East Gallatin drainage.

Montana courts have historically exhibited a wary treatment of attempts to take water out of one watershed and put them in another, observing that "waters primarly belong in the watershed of their origin." Galliger v. McNulty, 80 Mont. 339, 356, 260 P. 401 (1927), see also Spokane Ranch and Water Co. v. Beatty, 37 Mont. 342, 96 P.727 (1908); Hansen v. Larson, 44 Mont. 350, 120 P. 229 (1911); Meine v. Ferris, 126 Mont. 210, 247 P.2d 195 (1952). The cases are not of much help in determining what a trans-basin diversion is for these purposes, see generally, Orchard City Irrigation Dist. v. Whitten, 146 Colo. 126, P.2d 130 (1961), nor are they of much help in determining the merits of any particular use that involves this feature.

Presumably, concern for these developments is reflected by the water intensive character of the use insofar as future users in the basin or origin are concerned. In the present circumstances, Bozeman's new water use permit will not take all of the waters available in Hyalite Creek, and therefore there is some margin, albeit a small one, for future development. Bozeman's change takes no more than what has already been historically consumed within the basin of origin. For these reasons, Bozeman's trans-basin plans are explicitly authorized.

I note in passing that such dictum is otherwise incorrect even if the exclusive focus is on return flows. The cessation of return flows by a change may deprive a downstream senior of his supply, thus prompting a call on a junior upstream from the changed right.

In effect, such a change eradicates a downstream tributary insofar as the upstream junior is concerned. See generally, Vogel & Minnesota Land & Reservoir Co., 47 Colo. 534, 107 P. 1108 (1910).

Indeed the structure of the Montana Water Use Act serves to illustrate the complementary nature of the different proceedings. The adjudication procedures are designed to confirm and describe all rights existing as of July 1, 1973, in accordance with the law then existing. See MCA 85-2-102(7), MCA 85-2-212, MCA 85-2-221, MCA 85-2-224. The change/permit provisions are designed to take over where the adjudication leaves off. That is to say, the permit/change proceedings are intended to prevent the further development of the chaos that the need for a state-wide adjudication. Further, since the only question herein is one of whether the historic use limitations should be given effect in this administrative proceeding, the constitutional command that existing rights be confirmed and recognized, Mont. Const. Art. IX, Sec. 3(1), is not trespassed on. Procedural changes that implement the law existing on July 1, 1973, do not affront this provision. Castillo v. Kunnemann, 39 St. Rep. 460, 642 P.2d 1019 (1982).

No opinion is expressed herein as to the validity of Hoy Ditch Company's "surplus" water claim. Other objectors water uses are sufficient to trigger the scrutiny herein. Thus, no opinion need be expressed as to whether the repeal of the statutes restricting appropriations on adjudicated streams revived otherwise nonconforming water uses, see generally, Anaconda Nat. Bank v. Johnson, 75 Mont. 401, 244 P. 141 (1926), Hanson v. South Side Canal Users' Ass'n, 167 Mont. 210, 537 P.2d 325 (1975), or whether Hyalite was ever an adjudicated stream within the meaning of such statutes. See Stone, Are There Any Adjudicated Streams In Montana?, 19 Mont. L. Rev. 19.

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ADDENDUM B

(BP-1) A copy of a contract between Montana Power Company and the Bureau of Reclamation.

(BR-2) A hydrograph of Missouri River flows at the Canyon Ferry facility representing quantities of water stored at any given time at Canyon Ferry together with a direct flow rate of the Missouri River.

(BR-3) A summary of the spill periods at Canyon Ferry.

(BR-4) A hydrograph showing average net inflow into Canyon Ferry Reservoir from 1954 through 1980.

The Bureau's exhibits were received into the record.

The Department tendered a single exhibit, to-wit:
(DNRC-1) An Analaysis of Water Availalbility on the Missouri River above Canyon Ferry Reservoir prepared by a Department employee.

The Department's exhibit was received into the record.

PRELIMINARY MATTERS

The Montana Power Company propounded certain "Notices of Appropriation" which are claimed to evidence this entity's rights to the use of the water resource. These notices have not been shown to be competent evidence for such purposes, and they are hereby denied probative effect.

Montana Power Company implicitly argues that these filings are prima facie evidence as to the matters asserted therein by virtue of RCM 89-810 et. seq. While these provisions have been repealed by the Montana Water Use Act, MCA 85-2-101 (1981) et seq., the legislature most probably intended to abrogate only the

procedures detailed thereunder for evidencing the appropriate right. See generally, Mont. Const., Art. IX, Sec. 3(4). It would be incongruous to eliminate the evidentiary benefits of properly filed appropriative claims at precisely that time that such benefits would be of most material advantage in the adjudication process that supplanted the historic procedures. See generally MCA 85-2-201 (1981) et. seq.; see also Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist., ____Mont. ____, 36 St. Rep. 1403, 605 P.2d 1060 (1979).

Such filings are entitled to prima facie effect, however, only if such notices of appropriation have been filed in accordance with the provisions of the statutes providing for the same. See generally, Allen v. Petrik, 69 Mont. 373, 222 P. 451 (1924); Musselshell Valley Farming & Livestock Co. v. Cooley, 86 Mont. 276, 283 P. 213 (1929); Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897); Stearns v. Benedict, 126 Mont. 272, 247 P.2d 656 (1952); Peck v. Simon, 101 Mont. 12, 52 P.2d 164 (1935). Indeed, absent such compliance, such filings are incompetent evidence, being in the nature of self-serving hearsay. Galahan v. Lewis, 105 Mont. 294, 72 P.2d 1018 (1937); Shammel v. Vogle, 144 Mont. 354, 396 P.2d 103 (1964); Gilcrest v. Brown, 95 Mont. 44, 24 P.2d 141 (1933); Holmstrom Land Co., supra.

The instant notices are governed by RCM 89-810, the statutory provision regulating the historic doctrine of "relation back" and providing for the filing of "notices of appropriation" as an integral part thereof. See Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); Murray v. Tingley, supra. RCM 89-813 is

inapposite to the present filings, as that statute contemplated the recording of water rights in existence upon the effective date of the 1885 Act. The priority dates claimed herein are inconsistent with such a vintage water right.

An inspection of the present notices reveals that some or all of the same are deficient in some particular or another. For example, many of the notices have not been shown or by the terms thereof, do not show that any notice was posted at the intended point of diversion or that the instant notices were filed within twenty days of such date. See Galahan v. Lewis, supra; Holmstrom Land Co., supra. The date of appropriation referred to in RCM 89-810 must be the date of instigating the appropriation by posting the required notice, the whole purpose of the statute being to regulate the right of a prospective appropriator to relate his completed appropriation back to the priority date set by the initiation of the same. Some of the instant notices are not properly verified in accordance with the statute, rendering the whole of the same invalid. See Murray v. Tingley, supra; Shammel v. Voels, supra. Moreover, Montana Power Company has adduced no competent proof that it has succeeded to any right or interest of the prospective appropriators named in the instant notice. See Hayes v. Bunard, 31 Mont. 74, 77 P. 423 (1904); Camas Livestock Co. v. Warren, 103 Mont. 284, 62 P.2d 206 (1936); Cook v. Hudson, 110 Mont. 263, 103 P.2d 137 (1940).

Even assuming, arguendo, however, that the instant notices are in strict compliance with the statutory requirements, they nonetheless fail in the effect Montana Power Company assigns

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them. Said notices serve merely to replace the temporary posted notice, Musselshell Valley Farming & Livestock Co. v. Cooley, supra, and therefore can be at most a prima facie indication of what a prospective appropriator intends to appropriate in the future. The statute does not alter the well-established rule that actual application of water to beneficial use or at least completion of the diversion works therefore is a prerequisite for an appropriative right. See Bailey v. Tintinger, supra. The notice thus simply serves as notice to the public that the waters named therein may be appropriated, which appropriation would then relate back to the initiation of the appropriative plans. See generally, General Agriculture Corp. v. Moore, 166 Mont. 510, 534 P.2d 859 (1975). The measure of Montana Power Company's water right remains that quantity of water put to beneficial use over a reasonable period of time, Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922), and therefore in any event Montana Power Company must supplement the instant notices with proof establishing the same. Holmstrom Land Co. v. Musselshell County Mayland Creek Water Dist., supra; Iron v. Hyde, 107 Mont. 84, 81 P.2d 353 (1938), Missoula Light & Water Co. v. Hughes, 106 Mont. 355, 77 P.2d 1041 (1938); Miles v. Butte Electric Co., 32 Mont. 56, 77 P.2d 1041 (1938).

Similarly, although properly filed notices may be a prima facie indication of the priority of a particular right, Vidal v. Kessler, 100 Mont. 592, 51 P.2d 235 (1935), the instant notices are redundant in this regard, as other proof sufficiently establishes Montana Power Company's statute as a prior appropriator for present purposes. See MCA 85-2-311(2).